

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NO. 77-4162

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

No. 77-4162

CROSS-SOUND FERRY SERVICES, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR REVIEW OF ORDERS OF THE
INTERSTATE COMMERCE COMMISSION

JOINT BRIEF FOR THE INTERSTATE
COMMERCE COMMISSION AND THE
UNITED STATES OF AMERICA

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November 1977

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ISSUES PRESENTED

In respondents view, the principal question presented is whether the Commission's decision to grant Mascony a three-year term certificate of operating authority so as to enable it to attempt to institute a competitive ferry service is rational and based upon adequate findings supported by substantial evidence.

Subsidiary questions raised by petitioners and intervening petitioners' briefs are:

1. Whether the Commission failed to comply with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, et seq.) or its own Environmental Regulations, and if so, whether such non-compliance affords a basis for setting aside its otherwise proper order.

2. Whether the Commission so abused its discretion, in refusing to permit the National Railroad Passenger Corporation (Amtrak) to intervene at a late stage of the proceedings and make representations regarding an issue over which the Commission has no control.

STATUTES INVOLVED

Section 309(c) of the Interstate Commerce Act, 49 U.S.C. 909(c), provides in pertinent part:

(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements rules and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present and future public convenience and necessity; otherwise such application shall be denied.

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §4332, provides in pertinent part:

- . . . (2) all agencies of the Federal Government shall -
- (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;
 - (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . , which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;
 - (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

* * *

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * *

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses available resources;

The National Transportation Policy, 49 U.S.C., preceding §§1, 301, 901, 1001, provides in pertinent part:

It is hereby declared to be the national transportation policy of the Congress . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . . to cooperate with the several States and the duly authorized officials thereof; . . . - all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706, provides in pertinent part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

STATEMENT OF THE CASE

Petitioners seek review of the orders of the Commission entered in its Docket No. W-1270, Mascony Transport and Ferry Service Inc., Initial Operations - New London to Greenport, L.I., New York, served October 22, 1975, November 19, 1976, June 16, 1977 and August 29, 1977.

By application filed May 29, 1973, Mascony sought authority to operate in interstate or foreign commerce, as a common carrier by water in the transportation of general commodities and passengers by self-propelled vessels, between the ports of New London, Connecticut and Greenport, Long Island, N.Y. Mascony proposes to provide year-round service, making at least one round-trip daily between New London and Greenport during the winter months and four daily round-trips during the height of the summer season. (Doc. 324, p. 65).

At Greenport, Mascony's dock and terminal facility will be located between First and Third Streets. At New London, Mascony is negotiating with the New London Redevelopment Agency for use of the "DeNoia" property near Bank and Sparyard Streets. It plans to utilize the "Kellems" dock across from the redevelopment agency property. Maps of these locations can be found at (Doc. 315, pp. 7, 11).

Hearings were held at New London on October 29, 30, 31 and November 1, 1973; at Greenport on December 10, 11, 12 and 13, 1973 and January 8, 9 and 10, 1974; and at Washington,

D.C. on February 20, 1974. Almost 100 public witnesses testified in support of the application (Doc. 188, p. 3).^{1/} As noted by the presiding Administrative Law Judge:

They represented almost every conceivable background and occupation. They came from representative points in all of the New England States and particularly the eastern half of Long Island. They used the ferry when their travels were for business as well as pleasure or family requirements, including truckers.

Among the supporters of the application at the hearings was the Town Board of Shelter Island which submitted a resolution dated October 15, 1973 supporting the Mascony proposal (Tr. 1293, Ex. 71) and the Board of Trustees of the Village of Greenport, (Tr. 1370). Witnesses testified to the long waiting periods, poor car service and inadequate facilities they had experienced on the ferry service between Orient Point, Long Island, N.Y. and New London, which was operated by New London Freight Lines (NLFL), predecessor of petitioner Cross-Sound.

The application was opposed by NLFL, the Bridgeport and Port Jefferson Steamboat, Co. (BPJS), Shelter Island and Greenport Ferry Co. (SIGF) and East End Supply Co.

In an initial decision served June 19, 1974, the ALJ concluded that:

The services here sought by the public for ferry service between New London and the eastern end of Long Island - be it Orient Point or Greenport - exceed the capacity for a good part of the year. (Doc. 188, p. 10).

^{1/} A summary of their testimony can be found at (Doc. 324, pp. 116-127).

The ALJ noted that the public is willing to support competition and any consequences that might flow therefrom. (Doc. 188, p. 11). He further observed that:

NLFL is attempting to turn this proceeding into "not whether there shall be one or two services available to the public but rather which one of the two services shall be available." This position seems to ignore NLFL's public responsibilities in holding a certificate of public convenience and necessity to serve the public. NLFL concedes that a "responsive ferry service between Long Island and Connecticut is required for the public interest." And in such a concession it necessarily implies that such a responsive service does not exist today . . . The question might well be asked: how much protection does NLFL want or is its desire for protection insatiable.

In short, the ALJ found, in effect, that additional responsive ferry service was required by the public convenience and necessity. He nonetheless denied the application because, in his view, the record was not sufficient to determine whether the public safety would be protected at New London and due to the barrenness of the record on environmental determinations at Greenport (Doc. 188, p. 13)

Subsequent to the hearings, NLFL sold to Cross-Sound its common carrier authority between New London, Conn. and Orient Point, N.Y. This transaction was approved by the Commission and consummated on May 23, 1975. However, Cross-Sound did not attempt to intervene in the Mascony proceeding until October 29, 1975. Noting that the unaffiliated company (Cross-Sound) which acquired certain of protestant's (NLFL's) operating

authority had not shown any interest in this proceeding, the Commission, in an order dated October 22, 1975, reopened the record for the purpose of receiving additional evidence tendered by Mascony in response to the above discussed findings of the ALJ that the record was deficient in certain respects. By the same order, the Commission directed that an evaluation be made by Commission staff of the effects of the proposed service on the environment, in accordance with the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321 et seq. (Doc. 249). After it became clear that the proceeding was opposed by Cross-Sound, Mascony's tendered evidence was given no consideration, except in connection with preparation of the EIS. As discussed below, all parties including petitioners were afforded the opportunity to comment on both the draft and final EIS. (Doc. 324, p. 63).

A draft environmental impact statement was prepared and served on the parties and appropriate governmental agencies on February 3, 1976. Comments were received from 13 interested parties, including Cross-Sound. The final EIS was based upon these comments, information from other government agencies and an analysis of the record in the proceeding.

Mascony's proposal to use the Sparyard Street site at New London was analyzed in the EIS. I recognized that access to the DeNoia property in the vicinity of Bank Sparyard Streets, which is now owned by the New London Redevelopment

Agency, requires crossing ConRail tracks. (Doc. 324, p. 84). While 23 U.S.C. 322(a) provides for the elimination of grade crossings in the northeast corridor between Washington, D.C. and Boston, Mass., it was noted that the Secretary of Transportation may allow certain grade crossings to continue operating provided they are equipped with the best available protection.

The EIS was incorporated into the Commission's November 16, 1976 report and order and hence was subject to petition for reconsideration for at least 30 days prior to the Commission's order becoming administratively final. Such petitions were filed by a number of parties, including Cross-Sound but were denied by the Commission for failure to state reasons sufficient to warrant reconsideration.

In the report and order served November 19, 1976, the Commission, Division 1, determined that Mascony is fit, willing and able to provide a service which is required by the public convenience and necessity. The Commission noted that the benefits of a new service may very well lead to additional passengers thereby reducing the numbers of people who drive around Long Island Sound and increasing the number of tourists to the area to the direct benefit of the businesses located there (Doc. 324, p. 69). The Commission cited a study by the Connecticut Department of Transportation Bureau of Planning and Research, which found that an improvement in service might lead to more volume (id.). The Commission specifically rejected the contention that this is

a proceeding to determine which operation will provide ferry service to eastern Long Island, but found that there should be sufficient volume to maintain both Mascony's and Cross-Sound's operations. The Commission emphasized that there is no right to engage in water transportation without competition especially where, as here, the service provided in the past had not been satisfactory. The Commission noted that, "Although Cross-Sound's service may prove superior to that of NLFL, the past history of difficulties with existing service warrants the authorization of a second new service in competition with Cross-Sound's new service" (Doc. 324, p. 69).

The Commission took a "hard look" at the questions raised in the environmental impact statement, including the volume of traffic in downtown Greenport, and the safety of the ConRail track crossing in New London. It determined, however, that the projected fuel savings from the proposed operations could be significant and, on the whole, that the proposed operation would not have such a deleterious effect on the environment as to warrant denial of the application (Doc. 324, p. 60). Accordingly, the Commission concluded that this is not a federal action significantly affecting the quality of human environment. (Doc. 324, p. 72).

The Commission recognized that many problems remain before Mascony would be in a position to begin operating. It noted that Mascony must improve landing points, staging areas and comply

with various local, state and federal regulations, and secure appropriate permits (Doc. 324, pp. 70-71). The Commission recognized, that "We are in no position to comment on the merits of such applications for permits and our decision should not be interpreted as Commission support or lack of support for such applications", (Doc. 324, p. 71). Accordingly, the Commission found Mascony fit, willing and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act but granted only a three-year term certificate to give the Commission an opportunity to determine if Mascony has in fact begun to operate, is operating in the proposed manner and in in good faith taking measures to alleviate adverse environmental impact (Doc. 324, p. 71).

Petitions for reconsideration of the report and order were filed by several parties, including Cross-Sound, SIGF and BPJS. In an order served April 8, 1977, the Commission reopened the proceeding, directing Mascony to submit additional evidence in the form of verified statements regarding docking, staging and loading sites at Greenport and New London and permitted protestants to reply (Doc. 366).

On June 7, 1977, the National Railroad Passenger Corporation (AMTRAK) sought leave to intervene in these proceedings and to submit a verified statement to show its concern over the proposed use of a grade crossing at New London. By order served June 16, 1977, the Commission, Appellate Division 1, denied Amtrak's motion, finding that the evidence it sought to present

was substantially covered in the EIS and that no good cause appeared for reopening the proceedings. (Doc. 378, p. 1).

In that order, the Commission also evaluated the additional evidence submitted by applicant and protestants and found that Mascony still had various property right acquisitions to make or settle with finality, improvements to make, and had to comply with various local, state, and federal regulations. (Doc. 378, p. 3). Due to the circumstances present in this proceeding involving shore preparations subject to powers of control by other governmental entities and attracting extensive local interests, the Commission found that it is not reasonable to require that all such preparations actually be approved and carried out before a finding is made with respect to the Interstate Commerce Act that the public convenience and necessity justifies the grant of authority (Doc. 378, p. 3). The Commission affirmed its authorization of a three-year term certificate. In order to obtain an extension of the three-year term, Mascony must demonstrate within the 33rd month after issuance of its certificate, that it has been generally operating as proposed or under a more environmentally beneficial alternative, that it has endeavored to minimize adverse environmental impacts and is in compliance with the Interstate Commerce Act (Doc. 378, p. 3).

Subsequent petitions for reconsideration, reopening, further hearing and oral argument were denied in an order served August 29, 1977 (Doc. 396). Petitions seeking a determination that the proceeding involved an issue of general transportation importance were denied on September 22, 1977, as was a petition for administrative stay pending judicial review.

The instant proceeding was instituted on September 2, 1977. Petitioners sought a stay pending judicial review which was denied by the Court on October 4, 1977.

SUMMARY OF ARGUMENT

The Commission's decision to grant a limited term certificate was rational and based on substantial evidence of need for competing ferry services between New London and eastern Long Island. In granting the application, the Commission recognized that because of the numerous shore and harbor preparations that must be accomplished prior to beginning service, of which some are subject to the jurisdiction and control of other governmental entities, it would be unreasonable to require that Mascony complete all such preparations prior to the grant of the three-year certificate.

The Commission recognized that in this proceeding, the granting of the limited term certificate merely gives Mascony an opportunity to attempt to bring its plans for a competing ferry service into fruition. The fact that applicant cannot institute service immediately does not render it unfit to receive a limited certificate. The narrow construction that petitioners suggest would have precluded the Commission from granting Mascony a limited term certificate which permits the carrier to attempt to initiate a competitive ferry service found by the Commission to be required by the public convenience and necessity.

In granting the certificate, the Commission complied with the requirements of NEPA. That statute does not require an agency to hold hearings on the EIS. Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975). Rather, it is enough that all parties were given an opportunity to comment on the staff-prepared EIS and to seek reconsideration of the finding of the final EIS. Significantly, the final EIS was served long before the agency decision became final in this proceeding and was subject to the full administrative review process. The Commission took the necessary "hard look" at the predicted environmental impacts and reasonably concluded that on balance, Mascony's proposed operation's would not have such a deleterious effect on the human environment as to warrant denial of the application.

Exercising its broad discretion in such matters, the Commission reopened this proceeding for the limited purpose of making the necessary environmental evaluation and to monitor Mascony's progress in making the remaining shore and harbor preparations. In neither instance was the issue of need for service relitigated. The evidence which Cross-Sound would have liked to introduce was relevant, if at all, only to the issue of need for service and, therefore, irrelevant to the purpose of the limited reopenings.

The Commission did not abuse its discretion in refusing to permit Amtrak's very untimely intervention in this proceeding. Both Amtrak and DOT sought to introduce evidence as to the safety of Mascony's operation with respect to a grade crossing at Sparyard Street in New London, Connecticut. The New London grade crossings were thoroughly discussed in the EIS and the additional material would not have changed the outcome of the proceedings. Moreover the Commission recognized the Secretary of Transportation has the ultimate responsibility for determining which grade crossings shall remain open in the Northeast Corridor. If the crossing is retained, the Connecticut Public Utilities Commission has responsibility for determining whether the protection employed at the crossing is sufficient.

Thus, the Commission does not have jurisdiction to determine whether or not any crossing will remain open or what safety devices should be installed. It would have been unreasonable to deny the application because of the potential safety problem, when Mascony may be able to meet the safety criteria established by DOT and the PUC.

ARGUMENT

I.

THE COMMISSION'S ENVIRONMENTAL CONSIDERATION
IN THIS PROCEEDING IS CONSISTENT WITH THE
REQUIREMENTS OF NEPA AND OF ITS OWN
ENVIRONMENTAL REGULATIONS.

Petitioners object to the timeliness of the draft and final EIS which were prepared after the close of oral hearings in this proceeding. The hearings took place in late 1973 and early 1974. At that time, the Commission's regulations for the Implementation of Public Law 91-190, National Environmental Policy Act of 1969 and Related Requirements, 340 I.C.C. 431 (1972), did not contain provisions for staff preparation of an EIS, but required the parties to submit statements concerning five factors which NEPA required to be considered under section 102 (2)(C). When the proposed action was determined to have a significant environmental impact, a detailed EIS was to be made as part of the initial determination, subject to review and modification by the Commission when it entered its final orders.

In the instant case, the ALJ found that it was not possible on the record developed at the hearing to make an appropriate determination as to whether or not the granting of the application would be a major federal action within the meaning of NEPA (Doc. 188, p. 12). As a result of this ruling, the Commission directed the staff to participate in the proceeding to evaluate the environmental effects of the proposed service

(Doc. 249, p. 2).

The staff prepared draft EIS was served on February 3, 1973 (Doc. 294). On page 1 of the preface, the staff recognized that during the pendency of this proceeding the Supreme Court rendered its opinion in Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II), 422 U.S. 289 (1975) and that the Commission had issued a Notice of Proposed Rulemaking and Order, proposing substantial revisions to existing environmental rules, Revised Guidelines For the Implementation of NEPA, 350 I.C.C. 492 (1975). The instant proceeding then, was acknowledged to be a "bridge" case, with the environmental procedure representing a practical accommodation of completed staff work and evolving environmental consideration.

Contrary to petitioners' contentions, the draft EIS was not based upon "inaccurate information which presumably had been furnished to the ICC staff by applicant . . ." but was based upon the staff's own site inspection at New London and Greenport and its consultations with numerous parties and agencies. Among the sources consulted, in addition to Mascony, were the Connecticut Department of Transportation (Doc. 294, p. 17) the Connecticut Department of Environmental Protection (Doc. 294, p. 52), Cross-Sound Ferry Services, Inc. (Doc. 294, p. 17, 19), Greenport Planning Board (Doc. 294, p. 22), Suffolk County Planning Commission (Doc. 294, p. 21), New London Redevelopment Agency (Doc. 294,

p. 27), Suffolk County Traffic Safety Department (Doc. 294, p. 31), The Consulting Engineers to the Mayor of Greenport (Doc. 294, p. 35), and the United States Environmental Protection Agency (Doc. 294, p. 42).

Comments on the draft EIS were requested from numerous federal, state and local entities, including the Counsel on Environmental Quality, Environmental Protection Agency, (Regions I and II), The Department of Transportation (Regions I and II), The New York and Connecticut State Departments of Environmental Protection and Transportation, the City of New London, and the Village of Greenport. Each comment received a specific response from the environmental staff (Doc. 315, pp. 55-124) and the final EIS reflected corrections noted in the comments. The final EIS then, is based upon the comments received, the record developed in the proceeding and the staff's consultation with various governmental agencies. Petitioners and others had every opportunity to provide information and point out any errors in the draft. Thus, the document accurately reflects the environmental impacts which would result from a grant of authority. Petitioners meaningfully participated in the EIS development and cannot now complain of unspecified "inaccuracies".

Petitioners cite Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972) and

Harlem Valley Transportation Association v. Stafford, 500 F. 2d 328 (2d Cir. 1974) for the proposition that they are entitled to hearing and cross-examination on the environmental impact statement. This is clearly erroneous. No hearings are specifically required under NEPA or the purely advisory CEQ guidelines. Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1284-85 (9th Cir. 1973); City of New York v. United States, 344 F. Supp. 929, 940 (E.D. N.Y. 1972). Rather, it is within the agency's discretion to determine whether or not a public hearing is to be held. Scenic Rivers Association of Oklahoma v. Lynn, 520 F.2d 240, 246 (10th Cir. 1975), reversed on finding that no EIS was needed, 426 U.S. 776 (1976).

The text of NEPA does not require agency hearing and the courts have refused to read such a requirement into the statute.

Compare Natural Resources Defense Counsel v. U.S. Nuclear Regulatory Commission, 539 F.2d 824, 838 (2d Cir. 1976), cert granted, 97 S.Ct. 1578 (1977). The instant proceeding does not involve an issue of such magnitude and gravity that it must be accompanied by expanded procedural rights.

Despite petitioners' attempts to distinguish the language of SCRAP II (C-S. Br. p. 32),^{2/} the Supreme Court found that the earliest time at which NEPA requires an impact statement is when the agency makes a proposal, not when a proposal is made by a private party such as Mascony, SCRAP II, 422 U.S. at 320-21. An impact statement is required at the initial opinion stage, not at oral hearing. To the extent that Greene County, supra, Harlem Valley, supra, suggest that this is not so, the Supreme Court explained that these decisions appear to conflict with NEPA. SCRAP II, supra, 422 U.S. at p. 321 fn. 20. See also Kleppe v. Sierra Club, U.S. , 97 S. Ct. 2718, 2725 (1976).

While, technically, the Commission should have had its staff prepare the statement at the time of the initial decision, the ALJ found that there was insufficient evidence on the record from which to determine whether a grant of the application would constitute a major federal action having a significant effect on the human environment. (Doc. 188, p.13). At that point the

2/ The joint brief submitted by Cross-Sound SIGF, BPJS, and The Village of Greenport will be referred to as C-S Brief.

Commission took proper remedial action and ordered the staff to prepare an environmental evaluation.^{3/}

While water carrier applications are among those classes of proceedings which normally do not require an EIS, 49 C.F.R. 1108.9(4), the staff undertook a full-fledged environmental investigation rather than a Threshold Assessment Survey. Here, the impact statement itself, with its complete discussion of the action contemplated, of possible adverse environmental effects and the available alternatives, served as a record of the administrative procedures from which the Commission properly concluded that a limited term grant would not be a major federal action significantly affecting the quality of the human environment. Jicarilla Apache Tribe, supra, 471 F.2d at 1286.

Petitioners argue that because of the delay in complying with NEPA the Commission should be forced to start over again and hold new hearings in this proceeding. This argument was rejected in SCRAP II, supra, 422 U.S. at 321-22, where it was found that:

The ICC was in as good a position to correct a statutory error by integrating environmental factors into its [proceeding] and into its decision in May 1973, as it would have been if the October 4, 1972, report [the first agency proposal] had never been written; this it proceeded to do and we perceive no basis for affirming the District Court's decision [that the agency must start over again] in this respect. (Material in brackets added.)

Likewise, here, the Commission was in an ideal position to correct a similar statutory error which it did properly and without delay.

^{3/} Unlike the situations in the Greene County and Harlem Valley cases, the Commission did not rely on a statement prepared by any of the parties.

In Iowa City-Montezuma Railroad Shippers Association v. United States, 357 F. Supp. 321, 323 (C.D. Ia. 1972), as here, the Commission prepared the draft and final EIS after the close of the oral hearing in a rail abandonment proceeding. The draft EIS was served on all parties and various federal agencies with the latter submitting comments in reply. The Court upheld the Commission's finding that the abandonment would have no significant environmental effect and determined that the agency had undertaken a full, good faith consideration of the environmental factors. The Commission took a similar good-faith look at the environmental factors in this proceeding, incorporated the detailed discussion comprising the final EIS into its first report and clearly balanced the environmental factors in reaching its ultimate conclusion. NEPA requires nothing more.

Petitioners also argue that the proceeding must be remanded for failure to provide an opportunity for cross-examination of the environmental staff involved in the preparation of the EIS, citing the Revised Guidelines for the Implementation of the National Environmental Policy Act of 1969, 352 I.C.C. 451, served June 28, 1976 and the regulations promulgated therein, found at 49 C.F.R. 1108, et seq.

First, it is clear that the Commission issued the Revised Guidelines and adopted the regulations well after the close of oral hearings in this proceeding. It is recognized in 49 C.F.R.

1108.3(e)(1), that with regard to proceedings in progress, full compliance with the procedures set forth may not be possible. To the extent that section 1108.17(b) provides for cross-examination of witnesses with respect to the environmental statement and information in appropriate oral hearing cases, this is subject to the procedural requirements (i.e. service of the draft and final impact statements prior to oral hearing) noted in 1108.17(a). There is no provision for cross-examination, where, as here, there is the unusual situation of service of the draft and final EIS after the close of the oral hearings. While the Commission may have gone beyond the strict requirements of NEPA and SCRAP II, supra, in providing for the issuance of the EIS prior to oral hearing, this should not now be used as a means of invalidating Commission proceedings which were conducted prior to the issuance of the regulations.

Petitioners rely on the language in Revised Guidelines, supra, 352 I.C.C. at 460, where it is stated that:

Third, we have concluded that with respect to the timing of impact statements both the draft final statements normally will be prepared prior to hearing, whether oral or written. There are two underlying reasons for this conclusion. First, the Administrative Procedure Act requires that decisions in adjudicatory proceedings rest on the evidence of record, and as to such evidence, opportunity for cross-examination should be afforded. Inasmuch as NEPA requires that environmental factors be considered in the agency review process, the impact statement should be treated as evidence, subject to cross-examination, and be placed in the record

along with the other evidence. To ensure this, the final statement would be made available prior to the submission of written verified statements under modified procedure or 15 days prior to the commencement of oral hearings (or at least that portion of the oral hearing concerned with environmental matters). During the adjudicatory process any party will be permitted to challenge the conclusions of the impact statement by offering its own environmental evidence or by requesting cross-examination of Commission witnesses responsible for the preparation of the statement.

The "opportunity for cross-examination" discussed in the third sentence of the quoted language must necessarily be satisfied when parties are given an opportunity to challenge the conclusions of the impact statement by offering their own environmental evidence. Any other interpretation would invalidate all proceedings handled by means of modified procedure wherein no oral hearings are conducted and all testimony is submitted in the form of verified statements with opportunity for opposing parties to submit responsive statements.^{4/} The fact that NEPA is applicable to agency decision making where adjudicatory proceedings are not required indicates that the opportunity for cross-examination is not a prerequisite for full, fair consideration of the environmental consequences of a new service.

^{4/} At the Commission's discretion this entire proceeding, including substantive and environmental aspects, could have been handled under the modified procedure which, as pertinent, pertains to applications for certificates, permits and exemptions respecting water transportation of property or passengers under section 302(e) 303 and 309 of the Act. Rule 247(a) of the Commission's General Rules of Practice, 49 C.F.R. 1100.247(a).

The core of the NEPA legislation is the detailed impact statement which assumes its progression through the existing agency review process. Jicarilla Apache Tribe, supra, 471 F.2d at 1286. Significantly here, the final EIS was served long before the agency decision became final and was subject to the full administrative review process. In addition to commenting on the draft, the parties had an opportunity to comment on the final EIS as served and as adopted in the November 1976 report and order. That report was not administratively final but was subject to reconsideration by Division 1 acting as an Appellate Division pursuant to Rule 101(2), of the Commission's General Rules of practice, 49 C.F.R. 1100.101(2), then in effect.

The minimum periods for review as prescribed in 49 C.F.R. 1108.16(a) and in the CEQ guidelines were far exceeded in this proceeding. As required, no final administrative action subject to section 102(2)(c) of NEPA was taken sooner than ninety days after the date the draft statement was made available to CEQ or the public nor was there final administrative action in this proceeding sooner than thirty days after the date the final EIS was available to CEQ and the public. The agency did not adopt the EIS at a point in the proceeding which would have precluded further comment from the parties and further review by the Commission.

An examination of the environmental arguments raised by Cross-Sound, SIGF, BPJS and the Village of Greenport in their petitions for reconsideration of the November 1976 report,

indicates that the Commission acted well within its discretion in finding insufficient reason to hold further oral hearing or to revise its determination that this is not a major federal action significantly affecting the quality of the human environment and, accordingly, in denying the petitions for reconsideration (Doc. 356, p. 2).

In its petition for reconsideration of the November 1976 order, (Doc. 339, pp. 4-5), BPJS argued that the Commission should have held oral hearings on the EIS but did not cite any specific errors in the statement. In its petition, SIGF did not request oral hearing nor did it raise specific errors in the EIS. (Doc. 331). The questions raised by the Village of Greenport in its petition for reconsideration (Doc. 340) had already been brought to the attention of the environmental staff and incorporated into the final EIS, where relevant.^{5/} Greenport argued that there was no opportunity to analyze the proposal to use First Street for substantial ingress and egress of traffic. However, the use of First Street was specifically analyzed in Comment 64 to the Draft EIS (Doc. 315, p. 70) and in the final EIS (Doc. 324, p. 97). The impact on traffic congestion in Greenport was discussed at length in the EIS as was the physical condition of the Village

^{5/} Neither the litigation surrounding the use of the "Mitchell" property nor the fact that Mascony has assertedly failed to submit a final site plan to the Village Planning Board can properly be resolved in an EIS, as noted in paragraphs 22 and 62 of the response to comments to the draft EIS (Doc. 315, pp. 60, 69).

streets (Doc. 324, pp. 97-101). The Commission noted that the proposed operation would add a substantial volume of traffic to the streets of downtown Greenport and this was considered in the balancing of factors leading to the final determination that the proposed operation would not have such a deleterious effect on the environment as to warrant denial of the application (Doc. 324, p. 72). Finally, Cross-Sound, in its petition for reconsideration (Doc. 345) raised only one substantive issue with regard to the EIS; it questioned the finding that 600,000 gallons of fuel can be saved annually from institution of the new service. It was noted in the EIS that this figure could be overstated (Doc. 324, p. 102) because the new ferry service might create a demand for itself. Nevertheless, the Commission's conclusion that the proposed service is likely to have a beneficial impact on energy consumption was reasonable, based on the clear savings resulting from ferry travel between Greenport and New London as opposed to travel over the land route and the uncertainty regarding the amount of additional traffic generated by the ferry which would not have normally made the trip.

In Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 627, 838 (D.C. Cir. 1972) the Court held that:

so long as the officials and agencies have taken the "hard look" at environmental consequences mandated by Congress, the Court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the execution to the closure of the action to be taken.

Here, the Commission clearly took the hard look and reasonably chose to grant the 3-year term certificate after thorough environmental analysis. The Commission weighed the possible adverse and beneficial environmental impacts (Doc. 324, p. 7) in light of the clear need for an additional competitive service. Although Cross-Sound, BPJS, SIGF and other water operators were given every opportunity to participate in the Commission's environmental investigation and analysis they have no real standing to raise NEPA issues. They seek only protection from competition rather than environmental protection. Those carriers' sole motivation in this case is economic self-interest. They assert no environmental harm to themselves and are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest. Churchill Truck Lines, Inc. v. United States, 533 F.2d 411,416 (8th Cir. 1976).

In determining whether the requirements of NEPA have been met, the federal courts do not engage in a substantive review and in depth analysis of the EIS. The role of the court is restricted to determining whether the impact statement meets the procedural requirements of NEPA. Essex Courts Preservation Association v. Campbell, 399 F. Supp. 208, 210 (D.Mass. 1975) aff'd 536 F.2d 956 (3d Cir. 1976). Here, the Commission fairly considered the environmental factors in reaching its decision. The reviewing court should not substitute its judgment

for that of the agency's own determination of the environmental consequences of its actions. Kleppe, supra, 97 S. Ct. at 2731, fn. 21. The Commission has clearly shown that it has adequately considered the environmental effects of the application and a remand could only serve to protract this litigation for the sake of seemingly useless discussion. Armored Carrier Corp. v. United States, 260 F. Supp. 612, 617 (E.D.N.Y. 1966), aff'd per curiam, 386 U.S. 778 (1967).

II

THE COMMISSION'S DECISION TO GRANT A THREE YEAR TERM CERTIFICATE IS LAWFUL, RATIONAL AND BASED UPON ADEQUATE FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Issuance Of A Certificate Of Public Convenience And Necessity Is Entrusted To The Sound Judgment And Discretion Of The Commission.

It has long been held that Congress, by enacting the Interstate Commerce Act (Act), intended that the Commission determine what the public convenience and necessity require. In its exercise of administrative discretion, the Commission must "draw its conclusion from the infinite variety of circumstances which may occur in specific instances." Interstate Commerce Commission v. Parker, 326 U.S. 60, 65 (1945). The reviewing court's function is not to substitute its judgment for the agency's, but to ascertain ". . . whether there is warrant in the law and the facts for what the Commission had done." United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535-36 (1946); Widing Transportation, Inc. v. Interstate Commerce Commission, 545 F. 2d 552, 658 (9th Cir. 1976).

Pursuant to the Administrative Procedure Act, 5 U.S.C. 706(2), the agency's decision must be supported by substantial evidence and must not be arbitrary, capricious, nor an abuse of discretion. Bowman Transportation Co. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974).

Because of the expertise of the Commission in determining what the public convenience and necessity require, its orders are afforded a presumption of validity. Artus Trucking Co. v. Interstate Commerce Commission, 377 F. Supp. 1224, 1231 (E.D. N.Y. 1974). Warren Transport, Inc. v. United States, 525 F.2d 148,151 (8th Cir. 1975). As will be shown below, petitioners fail to rebut this presumption.

B. Mascony's Service Is Required By the Public Convenience And Necessity.

Under Section 309(c) of the Interstate Commerce Act, 49 U.S.C. 909(c), a certificate will be issued when the Commission determines that the applicant is fit, willing and able properly to perform the proposed service and that the service is required by the public convenience and necessity. The term public convenience and necessity is not defined in the Act. Rather, Congress intended that the Commission determine what the public convenience and necessity require. Rowman, supra, 419 U.S. at 297. In making that determination, the Commission considered the testimony of the more than one hundred persons appearing in support of the application (Doc. 324, p. 65) and the long waiting time and operational difficulties they generally experienced with regard to the services of Cross-Sound's predecessor NLFL (Doc. 324, p. 65).

The Commission also found need for additional water carrier competition between New London and eastern Long Island. It noted (Doc. 324 p. 69) that "there is no right to engage in water carrier transportation without competition, especially where, as here, the service provided has not been satisfactory". The Commission considers the importance of competition in evaluating the needs of the public. Chickasaw Motor Lines, Inc. Extension - Regular Routes From Memphis, Tenn., 121 M.C.C. 476, 479 (1975).

The courts have also recognized the importance of increased competition as a factor in arriving at a balance that is deemed public convenience and necessity. In Bowman, supra, 419 U.S. at 298, the Supreme Court held that "a policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration (citations omitted)". See also P. C. White Truck Line, Inc. v. Interstate Commerce Commission, 551 F.2d 1327, 1328 (D.C. Cir. 1977); Trans-American Van Services, Inc. v. United States, 421 F. Supp. 318, 321-24 (N.D.Tex. 1976); Chemical Leaman Tank Lines, Inc. v. United States, 343 F. Supp. 104, 109 (D. Del. 1972). Here, the Commission considered the effect of Cross-Sound's monopoly and concluded that a competitive environment is needed to ensure

adequate service to the public. The Commission recognized, (Doc. 324, p. 69) that ". . . although Cross-Sound's new service may prove superior to that of NLFL, the past history of difficulties with the existing ferry service warrants the authorization of a second new service in competition with Cross-Sound's new service".

Inadequacy of existing service is not a prerequisite to a grant of new authority. United States v. Dixie Highway Express, Inc., 389 U.S. 409, 411-12 (1967); Frozen Food Express v. United States, 346 F. Supp. 254, 259 (W.D. Tex. 1972). Rather, inadequacy is only one factor to be considered on arriving at the broader determination of the question of public convenience and necessity. Other elements include the desirability of competition and the desirability of improved service. Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D.N.H. 1964); Union Mechling Corporation v. United States, 390 F. Supp. 391, 430-31 (W.D. Pa. 1974); Security Barge Lines, Extension - Removal of Restriction, 344 I.C.C. 235, 243 (1973). The need for additional competition warrants a grant of this authority whether or not Cross-Sound's service is an improvement over that provided by NLFL.

C. Mascony Is "Fit, Willing And Able" To Provide The Proposed Service.

Petitioners contend that Mascony is not "able" to provide the proposed service because its right to use the "Mitchell" property at Greenport is presently being litigated in the New York State Courts and the New London operations involve passage over a railroad crossing. However, the Commission often grants three-year term certificates when there is a clear need for an applicant's services but the feasibility of its proposal is in question. For example, in American Delivery Systems, Inc. - Freight Forwarder Application, 346 I.C.C. 465, 478 (1974), the Commission granted a three-year term certificate authorizing nationwide freight forwarder service although applicant's proposed operations, which involved the establishment of terminals throughout the country and the recruitment of local agents, were still in the planning stages. Similarly, in Watkins Motor Lines, Inc. Extension - General Commodities, 114 M.C.C. 562, 565 (1972), applicant proposed a highly expedited motor carrier service which the Commission was not certain it could accomplish. Accordingly, the Commission granted a three-year term certificate stating that ". . . the feasibility of this new and untested service is to be proved during a trial period pursuant to a limited term certificate". See also Allied Delivery System, Inc. Extension - Michigan, 120 M.C.C. 110, 121 (1974).

Future need for service is one of the statutory bases upon which authority is granted^{6/} and is one of the criteria

^{6/} For example, 49 U.S.C. 909 (c) speaks of "present and future public convenience and necessity".

considered by the Commission in authorizing new service.

Hennepin Towing Co., Extension - Upper Mississippi River, 343 I.C.C. 422, 429-30 (1973); The Ohio River Company Extension - Lower Mississippi River, 343 I.C.C. 509, 522-24 (1973).

If "ability" is construed as narrowly as petitioners suggest, and held to mean ability to start new service immediately then there could be no grant of authority based on future need. Clearly that is erroneous. Ability can not be synonymous with immediate operation.

In its November 1976 report, (Doc. 324, pp. 70-71) the Commission stated:

First it should be noted that although we will grant the application, many problems remain before applicant will be in a position to begin operations. Applicant must determine where it will actually dock in Greenport, improve the landing point to allow its vessel to dock, secure and improve suitable staging areas, comply with various local, state and federal regulations, and secure appropriate permits. We are in no position to comment on the merits of such applications for permits and our decision should not be interpreted as Commission support or lack of support for such applications.

Again, in its June 16, 1977 order the Commission found Doc.378,p. 3):

With respect to matters involving docking, staging and unloading as to which the record was reopened, the updated evidence of record shows that applicant still has various property right acquisitions to make or settle with finality, improvements to make, compliance with various local, state and federal regulations to achieve before it will be able to begin a ferry operation; that, however, it still has active pending plans with respect to these matters; that under the circumstances present in this case, involving numerous shore preparations subject to powers of control by other

governmental entities and attracting extensive local public interest, it is not reasonable for this Commission to require that such preparation actually be approved and carried out before a finding is made with respect to the Interstate Commerce Act that the public convenience and necessity justifies granting the application;

The Commission was aware of the dilemma faced by applicant. In order to get certain local permits and approvals Mascony must show that the Commission has authorized the proposed operations. For example, Mascony applied to the Connecticut State Public Utilities Commission for a permit to construct a grade crossing at the Bank and Sparyard Street site in New London but its application was denied in view of the fact that it did not have operating authority from the Commission. (Doc. 324, p. 84). Similarly, the United States Army Corps of Engineers suspended action on Mascony's application for approval to construct dolphins in the Greenport harbor pending the issuance of operating authority from the Commission (Doc. 324, p. 85). If the Commission had refused to grant the limited term certificate because not all shore and harbor preparations had been accomplished, a "catch-22" situation would have resulted in which new service could never have been authorized. This is, of course, precisely the result carriers which would be subject to potential future competition by Mascony, which was found by the Commission to be required in the public interest are seeking. In light of the circumstances of this case the Commission's finding that Mascony is fit, willing and able to provide service under the three-year term certificate authorized by the Commission is reasonable.

D. The Commission Did Not Abuse Its Discretion By Refusing To Accept Evidence Of Operations From Competitors Of Mascony In Reopening The Record To Consider Environmental Evidence And In Directing Mascony To Present Further Evidence As To Docking, Staging And Loading At Greenport And New London.

The Commission reopened the proceeding on two occasions: in its October 22, 1975 order directing the staff to prepare an environmental evaluation (Doc. 249, p. 2) and again in the order of April 8, 1977, directing Mascony to submit further evidence as to its plans for docking, staging and loading at New London and Greenport (Doc. 356, p. 2). In the first instance, reopening was necessitated by the Commission's realization that the proceeding would require detailed environmental analysis and in the second instance reopening was necessitated by the Commission's continuing duty to monitor applicants' fitness and willingness to provide service. In neither instance was evidence regarding need for service considered in the limited reopenings ordered by the Commission. The new evidence that Cross-Sound and other ferry operators sought to introduce regarding their own services (see Cross-Sound Br. p. 17) would have been relevant only to the issue of need for Mascony's service, which was not under consideration.

Agencies have wide discretion in determining whether to reopen proceedings and to determine the extent of the

reopening required.^{7/} Bowman, supra, 419 U.S. at 294-295. In I.C.C. v. New Jersey, 322 U.S. 503 (1944), which is cited in the November 1976 report (Doc. 324, p. 64), the Commission reopened the proceeding for a limited purpose, and certain parties sought full reopening. The Court found (at page 517) that the Commission could take a second step in a ratemaking proceeding without retracing all previous steps. Here too, the Commission took a second step which did not require relitigation of the need issue.

7/ In Atchison, T. & S.F. Ry. v. United States, 284 U.S. 248, 260 (1932) cited by petitioners (C-S Br. p. 16), the significant relevant issue which warranted updating the record was the great depression. Surely, no similarly far-reaching economic event has taken place during the pendency of this proceeding. Delta Airlines, Inc. v. C.A.B., [Miami-Los Angeles Route] D.C. Cir. No. 76-1241, decided June 23, 1977 is similarly inapposite. There, the agency shifted a forecast year from 1974 to 1977 without giving petitioners an opportunity to show economic developments. In doing so, the court found that the Board had departed from an earlier position concerning the importance of certain service in selecting between competing carriers for the same route. The court stated (Slip. op. p. 32), "Arguably, at least, the impetus toward reopening an administrative record is greater where an agency's task is to choose between similarly-situated private parties, all of whom are doubtless capable of providing the service at issue" Here, of course, the Commission is not choosing between two services but is authorizing an additional service.

In application proceedings before the Commission, the "need issues" are often separated from the "fitness issues". The Commission's Fitness Flagging Procedures, for example, 49 C.F.R. 1067 et seq. provide for fitness to be litigated in one selected application proceeding while the carrier's other pending applications are heard solely on the basis of need for service. The latter proceedings are then held in abeyance until the fitness issue is developed in the "selected proceeding". Protestants get no opportunity to update their evidence or to show diminished need for service once the need issue has been decided, despite the fact that the "abeyance" time can be considerable. Similarly, in American Delivery Systems, supra, 346 I.C.C. at 473, the Commission reopened the proceeding for further hearings on applicants' financial fitness and the feasibility of its proposal, finding that consideration of evidence relating to need for service was not required at that stage of the proceeding.

In the instant proceeding, the April 1977 reopening was for the purpose of apprising the Commission of Mascony's continuing efforts to make shore and harbor preparations. Protestants were given an opportunity to reply. Had Mascony abandoned its efforts, the application would, in all probability, have been denied despite the fact that a need for service had already been found and applicant had previously been found fit.

This reopening was not for the benefit of Mascony, but was another hurdle in its attempt to secure a certificate. Rather than hurting protestants, this reopening delayed the issuance of a certificate.

Petitioners argue that the unfairness of the Commission's reopening actions is illustrated by its acceptance (in its October 22, 1975 order) of additional evidence introduced by Mascony (C-S Br. pp. 16-17). However, as the November 1976 report makes clear, (Doc. 324, p. 63), this evidence was originally accepted because Cross-Sound had not yet attempted to intervene in place of NLFL and the Commission considered the proceeding to be virtually unopposed. Ultimately, however, the additional material submitted by applicant was considered only insofar as such matters were encompassed in the final EIS. Of course, petitioner had every opportunity to contribute to the environmental statements as shown in part I of this brief.

In sum, the Commission reopened this proceeding to consider issues other than need for service. The Commission was well within its discretion in limiting the reopening especially since the issue of need is separable from the other issues in an application proceeding.

III. THE COMMISSION DID NOT ABUSE ITS DISCRETION
IN REFUSING TO ALLOW AMTRAK TO INTERVENE

Intervention in administrative proceedings is implicitly left to the Commission's own rules by the Interstate Commerce Act. Buckner Trucking Inc. v. United States, 354 F. Supp. 1210, 1219 (S.D. Tex. 1973). Rule 70(b) of the Commission's Rules of Practice, 49 C.F.R. 1100.70(b)-8/provides:

A petition for leave to intervene in any proceeding should be filed prior to the time the proceeding is called for hearing, but not after, except for good cause shown.

Amtrak filed its petition for intervention on June 7, 1977. The only reason given for the very untimely filing is that "Amtrak has but very recently learned of the proceeding and of the impact that approval of the application will have on Amtrak's operations". (Doc. 374, p. 1).

Amtrak has shown no good reason why it did not seek to intervene earlier. Notice of the application was published in the Federal Register on June 21, 1973. As stated in Buckner, supra, 354 F. Supp. at 299:

It is well established both by statute and judicial precedent that publication in the Federal Register is legally deemed notice to all interested persons. 44 U.S.C. §1507; Federal Crop

8/ Revised Rules of Practice became effective in July 1977. This provision is identical to the former Rule 72(b), 49 C.F.R. 1100.72(b).

Ins. Corp v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947). See 49 C.F.R. §1130.1(b). The summary of notices published, including applications for certificates of public convenience and necessity, are necessarily required to be concise. Braswell Motor Freight Lines v. United States, 274 F. Supp. 674 (N.D. Tex. 1967) (three-judge court). However, due process of law requirements dictate that interested persons be afforded proper notice of administrative proceedings. Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970). Accordingly, the notice as published must reasonably apprise any interested person of the issues involved in the proceeding. Refrigerated Transport Co. v. United States, 313 F. Supp. 880 (N.D. Ga. 1970) (three-judge court); see 5 U.S.C. §554(b); 49 U.S.C. §305(e). Such notice is generally considered adequate in the absence of a showing that an interested person was misled. Cella v. United States, 208 F.2d 783 (7th Cir. 1953), cert. denied, 347 U.S., 1016 74 S.Ct. 864, 98 L.Ed. 1138 (1954).

Amtrak does not claim that the federal register notice was inadequate,^{9/} or that it did not have constructive knowledge of the proceedings.

Although Amtrak's petition could have been rejected on the grounds of late-filing alone, the Commission recognized the purpose of Amtrak's participation, noting:

. . . petitioner seeks to intervene in opposition in this proceeding and have its tendered verified statement admitted into evidence to show its concern over safety considerations relating to applicants' proposed railroad grade crossing at the Bank and Sparyard Street site in the New London; that the material it seeks to present has been substantially

^{9/} In S.C. Loveland Co. v. United States, 534 F. 2d 958 (D.C. Cir. 1976), cited by Amtrak, there was no federal register notice of a new application. Here, the application was duly noticed.

covered in the environmental impact statement included as an appendix to the prior report; that no good or sufficient case appears for again reopening this proceeding at the late date.

Amtrak's intervention then, would not have materially added to the extensive discussion of the Bank and Sparyard Street rail crossing site, which contrary to petitioners' contention (C-S Br. p. 23) is contained in the EIS. There it is noted (Doc. 324, pp. 84-85) that:

Mascony's original site near Bank and Sparyard Streets assertedly has the potential for parking and staging 213 vehicles . . . utilization of the site as a ferry terminal would require demolition of certain buildings and handtopping the area. Mascony would have to install a grade crossing across the ConRail tracks with a fail-safe signal to satisfy the Connecticut Department of Transportation and the State Public Utilities Commission

If approval for a public grade crossing should ultimately be granted, applicant will install a fail-safe crossing signal and station attendants along the trucks to direct traffic safely across. The rail right of way would be fenced off.

* * *

Mascony proposes to stage vehicles west of the railroad tracks and direct them across the tracks directly into the ferry, which they will board by means of a non permanent 45 foot ramp. The major approach to the docking site would be by way of Bank Street, now a two-way with one parking lane and one traffic lane in each direction. An alternative means of access to Mascony's property would entail making a left turn from Sparyard Street.

The Secretary of Transportation and the (Connecticut) Public Utilities Commission have ultimate responsibility for the decision on whether or not to retain the Sparyard Street grade crossing and to determine whether sufficient protective devices have been installed. As noted in the EIS, Doc. 324, p. 85 Fn.6), the Secretary of Transportation may allow certain grade crossings to continue operating provided they are equipped with the best available protection, pursuant to 23 U.S.C. 322(a). In addition, the approval of the (Connecticut) State Public Utilities Commission is required to change the use and widen and install automatic protection at private grade crossings.

The Committee on Public Works report on P.L. 93-1111 indicates that the 1975 amendment to 23 U.S.C. 322(a) permitting Retention of certain crossings ". . . is specifically designed to accomodate a situation in New London, Connecticut, where trains are presently restricted to speeds of 25-30 m.p.h. because of severe track curvature, and where track relocation is not considered feasible. There are five crossings considered to be of unusually low potential hazard - Sparyard Street, Coast Guard Dock, Sail Loft, State Street, and Hallam Street - where it is believed the installation of warning and protective devices would offer a more appropriate solution than the elimination of crossings at grade."

Through the EIS, the Commission was aware that the Secretary of Transportation and the Connecticut Public Utilities Commission have ultimate jurisdiction and control over the

retention and use of the grade crossing at Sparyard Street. If the grade crossing is retained, Mascony will have to comply with whatever safety criteria are set by DOT and Connecticut PUC. It would have been unreasonable for the Commission to deny this certificate outright on the basis of safety at the Sparyard Street site when applicant may be in a position to satisfy the criteria that are ultimately set. Rather, the Commission took the reasonable approach, fully recognizing that this is one of the shore preparations that Mascony has yet to make which is subject to control by other governmental entities (Doc. 378, p. 3).

Petitioners also argue that the Commission erred in refusing to permit the Department of Transportation to intervene in this proceeding on August 1, 1977. (C-S Br. p. 21, 24, 25). First, it should be noted that in addition to the constructive notice which Amtrak had with regard to the instant application, DOT had actual notice as it was sent the draft EIS for comment (Doc. 294, p. 1). DOT did not send its comments in time for them to be included in the final EIS but the Federal Railway Administration indicated that the North East Corridor Program had been discussed with the environmental staff (Doc. 316, p. 1), and this was incorporated into the final EIS (Doc. 324, p. 5) DOT should have intervened when it became aware of Mascony's proposal. In any event, its intervention in this proceeding is unnecessary as it has ultimate jurisdiction over the disputed rail crossing.

CONCLUSION

For all the foregoing reasons, the orders of the Interstate Commerce Commission should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of November 1977, I have served true and accurate copies of the Joint Brief For the Interstate Commerce Commission and the United States of America upon all parties of record by first class mail, postage prepaid in the following manner:

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OFFICE OF THE GENERAL COUNSEL

November 21, 1977

A. Daniel Fusaro, Esq.
Clerk
U.S. Court of Appeals
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Foley Square
New York, N.Y. 10007

Re: No. 77-4162, Cross-Sound Ferry Services,
Inc. v. United States of America and
Interstate Commerce Commission
(G. C. File No. 3593)

Dear Mr. Fusaro:

Enclosed please find the original and ten (10) copies of the Joint Brief For The Interstate Commerce Commission and the United States of America for filing in the above-entitled proceeding.

Please acknowledge receipt by date-stamping the enclosed copy of this letter and returning it, at your earliest convenience in the provided self-addressed envelope.

Sincerely,

Ellen K. Schall

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(202) 275-7014

Enclosures

cc: All parties of record